

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 2000 Session

STATE OF TENNESSEE v. MICHAEL C. RICHARDSON, JR.

**Direct Appeal from the Circuit Court for Tipton County
No. 3594 Joseph H. Walker, III, Judge**

No. W1999-01044-CCA-R3-CD - Decided September 21, 2000

The Defendant, Michael C. Richardson, pleaded guilty to aggravated assault and was sentenced as a Range I standard offender to a suspended sentence of six years with ten years probation. The Defendant applied for judicial diversion pursuant to Tennessee Code Annotated § 40-35-313; however, the trial court denied the application. The Defendant appeals, arguing that the trial court abused its discretion in denying his application for judicial diversion. Finding no abuse of discretion, we affirm the trial court's denial of judicial diversion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JJ., joined.

Robert M. Brannon, Jr., Memphis, Tennessee, for the appellant, Michael C. Richardson, Jr.

Paul G. Summers, Attorney General and Reporter, Mark E. Davidson, Assistant Attorney General, Elizabeth T. Rice, District Attorney General, Deborah Alsop, Assistant District Attorney General, Henry P. Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Procedural History and Factual Background

The Defendant, Michael C. Richardson, a former Memphis police officer, was arrested in February, 1998 for aggravated child abuse and neglect of his five-month-old son. The Defendant's arrest warrant refers to a medical report that showed the following unexplained injuries to the child: (1) a fresh skull fracture; (2) a fresh leg fracture; (3) a fresh rib fracture; (4) an old, healing rib

fracture; (5) intracranial bleeding; and (6) chemical evidence of abdominal trauma.¹ The Defendant was indicted for aggravated child abuse and neglect by the Tipton County Grand Jury. Because the alleged victim was a child under six years of age, the indicted charge was a Class A felony. See Tenn. Code Ann. § 39-15-402(b).

On April 30, 1999, the Defendant pleaded guilty to aggravated assault, a Class C felony. The State recommended a suspended sentence of six years with ten years supervised probation and ordered that no contact be made with the victim except visitation ordered by the court. The injuries described in the arrest warrant were a part of the plea agreement as a stipulated statement of facts. At the time of the guilty plea, the Defendant apparently made an oral motion requesting judicial diversion, and a sentencing hearing was set for July 8, 1999. The Defendant subsequently filed a written "Application for Diversion Pursuant to Tenn Code Ann. § 40-35-313," which was heard by the trial court on July 29, 1999. Following the hearing, the trial court denied the Defendant's application, stating, "The Court doesn't feel this is a proper case to grant diversion, and I will put a written ruling down with regard to my findings." An order setting forth the trial court's reasons for denying diversion was filed on the same day, July 29, 1999.

At the sentencing hearing, the Defendant presented the following evidence to support his application for judicial diversion: (1) his lack of a prior criminal record; (2) his good educational record; (3) his good social history prior to the offense; (4) his generally positive attitude and positive behavior since the arrest; (5) his efforts that led to his receiving appropriate psychiatric treatment since the incident; and (6) his positive attitude concerning financial obligations, including those involving his former spouse and his children. The Defendant testified that job-related stress, long working hours undertaken in part to help with financial obligations, and lack of sleep immediately prior to the incident contributed to his injuring his son. The Defendant is currently working for Home Depot and said that he hopes to have a career with that company. The Defendant expressed his belief that being placed on diversion would benefit his family by allowing him to "receive more income which, of course, would allow [him] to support the family."

In regard to the child's injuries, the Defendant testified that he could not recall "every event that happened"; however, he did state that he was "very ungentle." The Defendant testified that he shook the child and "dropped him in the roller that he was in." According to the Defendant,

I just, I cracked. I lost it. I know I dropped him back in the roller or walker, and I know one time I ---- I didn't throw him, but I laid him forcefully down on the couch, you know, to try to get him to stop crying. I was going to get a bottle, another bottle. But that's ---- that's all I can remember.

The Defendant presented testimony from his brother, Frank Grisanti, Jr., a restaurant owner and lifetime resident of Shelby County, Tennessee. Grisanti testified that the Defendant had wanted

¹Detailed evidence in the form of medical reports describing the injuries suffered by the child were presented to the trial court at the sentencing hearing in July, 1999.

to become a police officer since high school and described the Defendant as “extremely shy and actually pretty darned reserved” For about twelve months leading up to this incident, Grisanti observed a change in the Defendant that he attributed to the stress of working long hours. Although Grisanti only saw the Defendant occasionally, he did notice that the Defendant was more tired than usual. Grisanti testified that the Defendant talked to him about the incident within a day or two of its occurrence, at which time the Defendant told Grisanti that he “might have hurt his baby”; however, the Defendant seemed unable to respond to questions concerning the details of what had happened. Grisanti testified that within one and a half to two hours of this discussion, he and the Defendant’s father made arrangements to take the Defendant to Saint Francis Hospital for counseling. According to Grisanti, the Defendant is “a lot different” since his hospitalization, and Grisanti expressed a strong belief that the Defendant is rehabilitated. Grisanti believed that the Defendant “wasn’t right” when he injured his child. Grisanti also testified that in his experience as a businessman, a person with a criminal record would likely not be able to obtain a managerial position.

The Defendant also presented testimony from Thomas Fontana, a neighbor of the Defendant who has known the Defendant “since first grade.” Fontana testified that the Defendant is “a real gentle type of person” and that the person who injured the victim was not the “real Mike Richardson.” Fontana concluded his testimony by stating that the Defendant loves his present job, has talked about hopes for advancement, and is sorry for the pain and suffering he has caused.

The State presented the testimony of Sergeant Alan Dieterlen of the Munford Police Department, who investigated this event and arrested the Defendant for aggravated child abuse. Dieterlen testified that when the Defendant was contacted about the incident, the Defendant asked him whether his supervisors had been contacted because he was concerned that he might be fired. Dieterlen testified that the Defendant never said anything about the child or the child’s welfare.

At the conclusion of the hearing, the trial court recited on the record the terms of the plea agreement and the factors that formed the basis upon which the trial court accepted the plea agreement. These factors included the following: that “the Defendant was a police officer in the past,” “that he was under substantial stress,” and “that this was an act or actions by him that were out of character.”

The trial court also stated as follows:

The Court felt there was a reasonable appreciation for the fact that he could be expected to be rehabilitated, that he would abide by the terms of probation, and that this was, while a very serious offense, . . . one that the Court didn’t feel was as much an intentional offense as an anger-related offense. I guess it was a knowing offense and intentional from the fact that it was done, but it was a result of stress and anger and not a mean act, I didn’t feel, by the defendant.

However, the trial court concluded that judicial diversion should be denied.

The detailed written order filed by the trial court later the same day, July 29, 1999, sets out in detail the findings of the trial court, which include the following:

The Court has considered the defendant's lack of criminal record, his social history, mental and physical condition, his attitude, behavior since arrest, emotional stability and the stress he claims he was under as a result of his employment at [sic] a police officer, his non drug [sic] usage, past employment, home environment, the fact that his marital relationship is disintegrating as a result of his actions with his child, the fact that his family responsibility of support does remain and he professes a desire to meet this responsibility even though he has no visitation privileges, his general reputation before this incident, and amenability to correction. The Court finds that the circumstances of the offense have strong bearing on this issue, and the defendant has not accepted what happened in a way to be candid about the events that let [sic] to the severe injuries to his child. The defendant testified he picked up the child and "was not gentle" with the child, which [sic] suffered a skull fracture, leg fracture, rib fracture, and had old injuries. The defendant alleges stress from work caused him to not treat his child appropriately. He was not candid with medical authorities about what happened, and was not candid with the Court. The Court has also considered the deterrent effect of punishment upon other similar criminal activity, and the likelihood that judicial diversion will serve the ends of justice and best interests of both the public and the defendant, and finds that it would not in this particular case.

II. Analysis

The issue presented by the Defendant for review is whether the trial court erred in declining to impose a sentence pursuant to Tennessee Code Annotated § 40-35-313, commonly referred to as judicial diversion. According to this statute, the trial court may in its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A). A qualified defendant is one who pleads guilty or is found guilty of a misdemeanor or a Class C, D or E felony; who has not previously been convicted of felony or a Class A misdemeanor; and who is not seeking deferral for a sexual offense or a Class A or Class B felony. Tenn. Code Ann. § 40-35-313(a)(1)(B)(I)(a)-(c); State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

When a defendant contends that the trial court committed error in refusing to grant judicial diversion, this Court must determine whether the trial court abused its discretion in failing to sentence pursuant to the statute. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997); State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993). Judicial diversion is similar to pretrial diversion; however, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial

court's decision. Cutshaw, 967 S.W.2d at 344; Parker, 932 S.W.2d at 958. As this Court said in Anderson,

[w]e conclude that judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under T.C.A. § 40-15-105. Therefore, upon review, if "any substantial evidence to support the refusal" exists in the record, we will give the trial court the benefit of its discretion. Only an abuse of that discretion will allow us to overturn the trial court.

857 S.W.2d at 572 (citation omitted).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion include the following: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. Cutshaw, 967 S.W.2d at 343-344; Parker, 932 S.W.2d at 958. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as the defendant. Cutshaw, 967 S.W.2d at 344; Parker, 932 S.W.2d at 958.

In this case, the record indicates that the trial court considered and balanced the appropriate factors when it denied the Defendant's application for judicial diversion. Although the trial court recognized and considered several factors that were favorable to the Defendant, it concluded that any favorable factors were outweighed by the circumstances of the offense, the Defendant's lack of candor and the deterrent effect of the ruling. The trial court also found that the Defendant had not fully accepted responsibility for his role in severely injuring the child, as evidenced by the Defendant's lack of candor concerning how the injuries occurred. We find that there is substantial evidence to support the trial court's denial of judicial diversion.

In the last full paragraph of the trial court's order denying judicial diversion, the trial court states as follows:

Further, diversion under T.C.A. 40-35-313 is a decision for the Court, without entering a judgment of guilty and to defer further proceedings and place the person on probation before sentence is imposed. In this case the defendant entered a plea upon an agreed sentence of six years, with the state submitting that probation was appropriate, which plea agreement was accepted by the Court April 30, 1999.

One interpretation of this language would indicate a belief by the trial court that it was precluded from sentencing the Defendant to judicial diversion because a plea agreement had already been "accepted" on April 30, 1999. The record in this case clearly indicates that the plea agreement was entered on April 30, 1999 with the understanding that the Defendant was requesting judicial diversion and that the trial court would either grant or deny judicial diversion after a hearing on that issue. The hearing occurred on July 29, 1999. The sentence, which included the trial court's denial of pretrial diversion, was actually imposed by the entry of a judgment on July 29, 1999. The

judgment clearly was not entered on April 30, 1999, because the parties contemplated a judgment or an order being entered after the hearing on the issue of judicial diversion. Had judicial diversion been granted, an order placing the Defendant on judicial diversion would no doubt have been entered rather than a judgment.

We find that prior to the last full paragraph of the trial court's order denying judicial diversion, the trial court stated specific reasons supporting the denial of judicial diversion and why these reasons outweighed other factors for consideration. Thus, even if the trial court was mistakenly under the impression that it was somehow precluded from granting judicial diversion based on the plea agreement being "accepted by the Court April 30, 1999," we find that the trial court properly considered the Defendant's application for judicial diversion on the merits. Further, the trial court appropriately weighed and considered the appropriate factors and based its denial of judicial diversion on substantial evidence. We find no abuse of discretion by the trial court.

Thus, the judgment of the trial court is AFFIRMED.

ROBERT W. WEDEMEYER, JUDGE